Supreme Court, U.S.
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No. 02-0168

In The
Supreme Court of the United States

DUDLEY FOUSSELL,

Petitioner,

vs.

MALLARD BAY DRILLING, L.L.C., TEXAS MERIDIAN RESOURCES CORPORATION, PARKER DRILLING OFFSHORE USA, L.L.C., THE MERIDIAN RESOURCE CORPORATION, THE MERIDIAN RESOURCE & EXPLORATION COMPANY, C&F OFFSHORE SERVICES, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT PARKER DRILLING OFFSHORE USA L.L.C.'S BRIEF IN OPPOSITION TO DUDLEY FOUSSELL'S PETITION FOR WRIT OF CERTIORARI

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CORPORATE DISCLOSURE

Parties to the Proceeding and Statement Pursuant to Rule 29.6

Pursuant to Rule 29, the Corporate Disclosure requirement was provided in the Petition for Writ of Certiorari.

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RESPONDENT PARKER DRILLING CORPORATION'S BRIEF IN OPPOSITION TO DUDLEY FOUSSELL'S PETITION FOR WRIT OF CERTIORARI

I. CLARIFICATION OF THE RECORD

The Statement of the Case in the Petition leaves out all facts related to the extreme negligence of Dudley Foussell. It also ignores the evidence from David Serrette and the expert for Parker Drilling, Richard Frenzel, that there were many safe ways to stow the pipe on the vessel that were not used by Captain Foussell. It is a specific misstatement by Petitioner that David Serrette knew the pipe had "to be stowed partially in the cabin and partially on the rear deck of the M/V MARAGRET." Parker Drilling will simply repeat the Statement of Facts it presented to the Fifth Circuit as an accurate summary of the facts.

Foussell was captain of the M/V MARGARET on August 16, 1997. Dudley Foussell had several years of experience on crew boats and had carried pipe to crew boats many times. On many occasions, he would carry the pipe in the cabin of boats and would not secure the pipe. He could have tied it to a rail on the side of the boat but he did not think of it. When there are no cleats on the side of a crew boat, it is very common to put pipe in the cabin.

On the morning of August 16, 1997, Foussell was awakened by the dispatcher, Gary Reeves, who told him that they were going to take the pipe off the boat. Foussell went back in the cabin of the boat to put on his shoes which were under the pipe. The pipe fell on Foussell's head or neck when he put his head under the pipe. Foussell saw Reeves holding the pipe. However, Reeves denies pulling

the pipe but he thought the pipe was pulled by someone when Foussell was hit.

It was Foussell's decision as to where to stow the twenty-foot piece of PVC pipe. He decided to put the pipe in the cabin. The day before he had put an iron pipe in the cabin and it had scratched the floor. On this occasion, he decided to put the end of the pipe on the water cooler so it would not scratch the floor. He did not want to secure the pipe to anything in the cabin because he might need to move it quickly. It is the captain's duty to secure cargo.

The expert for Parker Drilling Company, Richard Frenzel, testified that there were at least four safe methods to carry the PVC pipe on the vessel which were either secured on the side of the vessel or over the cabin or in the cabin. In any of these methods, the pipe should be secured to the vessel and this can be done safely. The toolpusher, David Serrette, was of the opinion that Dudley Foussell had enough experience to know that pipe should be secured on the vessel and it was the captain's duty to secure pipe and other cargo. Mr. Serrette considered that it was safe to carry a twenty-foot piece of pipe on this crew boat. He had seen pipe secured on crew boats over twenty-five times. The water cooler on the M/V MARGARET was eighteen inches tall and had an oval or rounded top. Mr. Serrette described methods to safely secure the pipe on the side of the vessel or on the top of the cabin.

REASONS FOR DENYING THE WRIT

I. The Suggested Conflict Between the Circuits Is Questionable And, If It Exists, the Conflict Is Not Mature For Review.

Petitioner's request for review is based primarily on a supposed conflict in the circuits. Specifically, Petitioner highlights the conflict between the Fifth Circuit in *Gautreaux v. Spurlock Marine Ins.*, 107 F.3d 331, 335 (5th Cir. 1997) and the Second Circuit in *Williams v. Long Island Railroad Co.*, 196 F.3d 402, 406 (2d Cir. 1999). Petitioner states that the *Gautreaux* court requires an ordinary care standard for negligence under the Jones Act, 46 U.S.C., Sec. 688, while the Second Circuit has only a featherweight standard. The Fifth Circuit in an en banc decision in *Gautreaux* found that its previous cases had been mistaken in finding a featherweight burden of proof for negligence in Jones Act cases. The *Gautreaux* court engaged in a detailed analysis of how the Fifth Circuit had mistakenly moved from a standard of slight causation in *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 506, 1 L.Ed.2d 493, 77 S.Ct. 443 (1957) to a standard of slight negligence. The court corrected this mistake and found that a reasonable care standard was supported in the other circuits and the Supreme Court. The Fifth Circuit cited the following cases in support of its holding: *Fashauer v. New Jersey Transit Rail Operations, Inc.*, 57 F.3d 1269, 1283 (3d Cir. 1995); *Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54, 67, 87 L.Ed. 610, 63 S.Ct. 444 (1943); *Smith v. Tow Boat Serv. & Management, Inc.*, 66 F.3d 336 (9th Cir. 1995) (unpublished); *Karvelis v. Constellation Lines, S.A.*, 806 F.2d 49, 52-53 (2nd Cir. 1986), *cert. den.*, 481 U.S. 1015, 95 L.Ed.2d 498, 107 S.Ct. 1891 (1987); *Ybarra v. Burlington N., Inc.*, 689 F.2d 147, 150 (8th Cir.

1982); *Joyce v. Atlantic Richfield Co.*, 651 F.2d 676, 681 (10th Cir. 1981); *Urie v. Thompson*, 337 U.S. 163, 174, 93 L.Ed. 1282, 69 S.Ct. 1018 (1949).

The Fifth Circuit in *Gautreaux* analyzed its prior cases and found that it had mistakenly established a rule that employees were liable to seaman when they were only slightly negligent. The court said:

> The above survey of our decisions shows the confused start and the diverted path leading to the "settled law" in this Circuit that a Jones Act employer is bound by a greater-than-ordinary standard of care towards its employees and that a seaman owes only a slight duty to look after his own safety. We agree with the Third Circuit that nothing in the text or structure of the FELA-Jones Act legislation suggests that the standard of care to be attributed to either an employer or an employee is anything different than ordinary prudence under the circumstances. *Fashauer v. New Jersey Transit Rail Operations, Inc.*, 57 F.3d 1269, 1283 (3d Cir. 1995). p. 738

The only case since the *Gautreaux* case that has commented on the Fifth Circuit position is *Williams v. Long Island Railroad Co.*, 196 F.3d 402, 406 (2d Cir. 1999). The Second Circuit in *Williams* acknowledged the *Gautreaux* conclusion but determined that it would follow *Ulfik v. Metro-North Commuter R.R.*, 77 F.3d 54, 58 (2d Cir. 1996) to maintain a "relaxed standard for negligence." The *Ulfik* court stated in a footnote that the Supreme Court has not held that a relaxed standard for negligence applies under FELA. It went on to state that a prior Second Circuit case had found a relaxed standard of negligence, citing *Syverson v. Consolidated Rail Corp.*, 19 F.3d 824, 825 (2d Cir. 1994). However, the *Syverson* court

only quoted the statute establishing a reduced standard of causation, not a reduced standard for negligence. The court said:

> Thin as this evidence is, it is enough under FELA to raise a jury question as to whether the railroad exercised *reasonable care* given what was reasonably foreseeable, to furnish Syverson with a safe workplace. p. 827. (emphasis added)

The court did not say that the standard was slight care or slight negligence. The *Ulfik* court did not comment on the *Karvelis* case cited by the *Gartreaux* court as supporting the reasonable care standard in the Second Circuit. Thus, the analysis by the *Williams* court was superficial and made no effort to compare the burden of slight causation to the burden of slight negligence in prior Second Circuit cases.

It is clear that the Second Circuit has not carried out a cathartic analysis of this issue as was done by the en banc Fifth Circuit in *Gautreaux*. There are still inconsistencies in the Second Circuit cases and there is not an established rule that slight care as opposed to reasonable care for the employer is enough. Respondent submits that there is not a clear rule within the Second Circuit so that it can be said that the Second Circuit is in conflict with the Fifth Circuit, which has established a clear rule in the en banc decision in *Gautreaux*.

In neither the *Gautreaux* nor *Williams* cases was there a petition for certiorari filed. There have been no cases discussing a possible conflict between the circuits since the *Williams* case. Plainly, from this lack of discussion on this issue in the circuits this issue regarding the standard for negligence is not a significant issue at this

time. This question should be allowed to percolate for a period of time to allow the Second Circuit and other circuit courts to consider the reasoning carried out by the en banc Fifth Circuit court before the Supreme Court considers taking this issue.

II. The Case is Fact-Bound and is Unworthy of Supreme Court Review.

In the court's Final Judgment, its Ruling dated November 27, 2000, was incorporated (Petitioner's App. 4). The court's Ruling dealt primarily with Foussell's complicated medical condition. In the Ruling, the court adopted its preliminary rulings and partial Findings of Fact and Conclusions of Law announced at the end of the trial. These extensive findings on liability are quoted in Respondent's appendix. The purpose of including these findings as an appendix is to show the lengthy and well considered analysis by the trial judge of the facts surrounding the accident. The Petitioner accused the trial judge of bias in the appeal to the Fifth Circuit; however, the Fifth Circuit opinion rejected this bias argument and stated " . . . what we see is a very engaged and knowledgeable district judge doing her job well." In forty-eight pages of the partial Findings of Fact and Conclusions of Law (Petitioner's App. 3) the trial court made an analysis of liability. The court explained in this lengthy analysis why the plaintiff was 75% at fault, the defendant, C&F Offshore was 25% at fault and why Parker Drilling was not at fault. A reading of the court's conclusions and analysis shows the following:

1. Captain Foussell accepted the pipe on the boat and if he thought it was not safe, he would not have accepted it, since he left jobs

in his past because of unsafe practices. (Respondent's App. 21)

2. The primary cause of the accident was Captain Foussell's negligence in choosing to put the end of the pipe on a water cooler with a rounded top. (Respondent's App. 24-25, 36-37)

3. There were several safe methods that Captain Foussell could have used to secure the pipe. If he had not placed the pipe on an unstable and rounded surface, an accident would not have occurred. Since Foussell was captain of the vessel he was in charge of safety on his vessel. (Respondent's App. 21)

4. The toolpusher, David Serrette, was not negligent in ordering that the pipe be transported on the vessel, since pipe had been transported on the vessel before and there were safe methods to do so. (Respondent's App. 23-24)

5. Gary Reeves of C&F Offshore was 25% negligent in not giving the captain a "heads up" before he moved the pipe. (Respondent's App. 20, 24-25)

Dudley Foussell did not make a compelling case for negligence against Parker Drilling before the trial court. Petitioner did not even present an expert to state that this vessel was too small to carry this particular pipe. The expert for Parker Drilling, Richard Frenzel, stated that there were at least four safe methods by which the pipe could be secured and carried on the vessel. Given the fact that there were other safe methods to load the pipe, there were two intervening factors that caused Foussell's injuries. First, there was Foussell's negligence in placing a

pipe on a rounded top of a water cooler which was unsecured. Second, there was the negligence of Gary Reeves in moving the pipe while Foussell was bent underneath the pipe.

Even assuming that any conflict in the circuits on the issue in question should be reviewed, this case is far from a good candidate for this review. The primary issue before the trial court was the competing negligence between the Petitioner, Dudley Foussell, and Gary Reeves of C&F Offshore. The type of case that should be reviewed would be one where employer was the only defendant and the issue of slight or reasonable care was distinct and well presented.

III. The Degree of Negligence Issue Was Not Raised in the Lower Courts or Discussed By the Courts.

At the trial court level and before the Fifth Circuit, petitioner never argued or suggested that under the featherweight standard of negligence that Parker Drilling would be found at fault. There was no suggestion that this position was being taken. Thus, the trial court did not pass on the factual or legal aspects of this allegation. There is little doubt based on the extensive findings of the trial court that the court would have concluded that Parker Drilling was not negligent either under a featherweight burden or a customary burden of reasonable care. However, petitioner did not raise this issue and this is another reason why this case is inappropriate for granting certiorari.

CONCLUSION

The trial court thoroughly analyzed the facts and found that Parker Drilling was not negligent. The court was correct. Further, it is very questionable that there is a conflict in the circuits on the issue of slight versus reasonable care. Certainly, if there is any conflict, it is not such a mature or significant conflict to warrant review.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

DUDLEY FOUSSELL, Plaintiff,	*	Docket No. CV99-399
VERSUS	*	August 10, 2000
	*	9:00 a.m.
MALLARD BAY DRILLING, LLC, ET AL, Defendant.	*	Lafayette, Louisiana

****

EXCERPT FROM VOLUME IV
REPORTER'S OFFICIAL TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE REBECCA F. DOHERTY,
UNITED STATES DISTRICT JUDGE

COURT REPORTER: Patricia L. Gass, RPR
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* * *

[213] Plaintiff, Dudley Foussell, is a Jones Act seaman who was employed as the captain of the crew boat, the Marine Vessel MARGARET, owned and operated by his employer, Parker Drilling Offshore USA formerly Mallard Bay Drilling. Parker was engaged in drilling operations for Meridian Resources Corporation on Rig 23 located in Matagorda Bay off the coast of Texas at the time this incident occurred.

At the time of the incident, C&F Offshore Services, Incorporated via the dispatcher, Gary Reeves, was providing dispatching services to Meridian for Rig 23. A formal

written contract was executed between Meridian and Parker. However, the relationship between C&F and Meridian was one of longstanding and had been confected [sic] by a handshake between Ron Ivy, Vice President of Drilling Operations for Meridian, and Frenchy Baumgardner, President of C&F.

On August 15th, David Serrette, who was the tool pusher for Parker Drilling, had sent Mr. Dudley Foussell, the captain of the Marine Vessel MARGARET, to the dock in order to receive and transport a piece of PVC pipe which had been ordered and was needed by Serrette to complete certain [214] shutdown rig operations on Rig 23. All witnesses agree and the invoice, which was presented as an exhibit in this matter, establishes that the 20 foot piece of PVC pipe had in fact been ordered on behalf of Mr. Serrette and had in fact been delivered to the dock on August 15th and was received by Mr. Reeves on August 15th. However, it is here that the memories of the various witnesses involved tend to diverge.

Plaintiff has testified that he did not load the pipe immediately but after it arrived at four p.m.; and sometime in that period, he engaged in loading the pipe onto the Marine Vessel MARGARET with the help of the delivery truck driver, with Reeves as an onlooker or engaged or involved to some extent. It becomes somewhat cloudy as to what Mr. Reeves was doing at that time, except that he was part of the endeavor. To what degree he was involved at that time, the witnesses tend to disagree. Not so much that one remembers specifically one way or the other, but rather that memories fade. However, it is clear and this Court specifically makes the finding of fact that Captain Dudley Foussell loaded the pipe with full knowledge of the C&F dispatcher, Reeves. Serrette, David

Serrette, the tool pusher for Parker had sent with specificity the Marine Vessel MARGARET to go get the pipe rather than using the tug, which was also available. It is not clear whether the [215] alleged accident occurred when the pipe was being loaded or unloaded. However, all versions of the accident from the various witnesses who were present and presented to this Court agree that Dudley Foussell and Mr. Reeves were each in his own way engaged in the process in some fashion of handling this pipe or the movement of the pipe. Mr. Reeves later in his deposition indicates that he did not touch, physically touch the pipe; but he admits he was there during the loading, and in his position admits he was there in the off-loading if in fact that did occur. So he was engaged in the process, whether loading or unloading, to some extent; and Mr. Foussell admits and the other witnesses agree he was engaged in both activities if in fact both did occur.

Consequently, whether they were loading or unloading, it would seem, would not necessarily be determinative. Rather, what would be determinative is, first, whether an accident actually occurred, other than perhaps the captain bumping or hitting the pipe on his own; and if so, who was involved in the ongoing process when the accident occurred; and when the accident occurred, what the mechanics of the actual process which was ongoing were. It would seem these would be the more determinative factors. Consequently, this Court makes the following findings of fact:

First, as to whether or not an accident occurred, this [216] Court finds that an accident did occur on August 16th, 1997. This Court makes that finding based upon the plaintiff's testimony that the pipe hit him and hit him in the back of the head at the base and on the portion of his

neck. It further makes this finding based upon Reeves' statement and testimony that Mr. Foussell came out onto the back deck of his boat, saying that the pipe had hit him. This finding is bolstered by Mr. Bullman, the tug captain, who has no stake in this matter as a litigant or party, who also indicated that although it was a, quote, nonevent, close quote, in his opinion, he does remember laughing because the captain said, you know, he got hit; and it seemed to him for some reason comical. This finding is further bolstered by the incident report and the investigative report. Although there is a discrepancy between the two as to the occurrence, whether it was loading or unloading, both indicate that Mr. Foussell said and told Mr. Serrette that he had had an accident and he had hurt his neck and back. Additionally, this is bolstered by Mr. David Serrette's testimony that in fact on the 16th, Mr. Foussell did come to him and say "I had an accident," and that Mr. Serrette hoped that it would not be something that would be reportable because Mr. Foussell said he was all right. And therefore, Mr. Serrette hoped that it would not have to be a lost-time accident; and it's [217] also bolstered by the testimony of Mrs. Foussell. Consequently, this Court finds that an incident, an accident did occur on August 16th, 1997 involving Dudley Foussell.

Now, who was involved in the ongoing process at the time? This Court finds based upon the more credible testimony presented that the plaintiff had been involved in the loading and, if in fact off-loading occurred, in the off-loading. This Court finds based upon Mr. Reeves statement given some two months after the accident that the statement which was entered into evidence – and the statement was taken on November 3rd, 1997, this incident having occurred on August 16th, 1997 – that Mr. Reeves

admitted at that time that he was there and that he was involved. In fact, his statement in pertinent part reads as follows:

The pages are not numbered. I'm assuming it would be Page 2. Question: "So it was you two guys loading this plastic pipe in the crew boat; right?" And reference is being made to a potential Brown Water hand being there with him. Answer: "It was already in the crew boat, and we were going to take it out." Question: "Okay. Who put it in the crew boat? Do you know?" Answer: "Yeah. They loaded it in there like the night before, we had loaded it in there." Question: "Who loaded it in there?" Answer: [218] "Myself and Dudley." Question: "Okay. So the pipe was already in the boat. You all were unloading the pipe?" Answer: "Yes, ma'am." Question: "So yourself and Dudley loaded the pipe the night before, and now it's the next day. And you all are unloading the pipe?" Answer: "Right." Question: "Okay. So you and another gentleman were unloading the pipe. And did you all know that Dudley was in the boat?" Answer: "Did I know he was in there?" Question: "Yes." Answer: "Yes, ma'am. He had walked in the front to help us unload it. He was in the boat to help us unload it." Question: "So he was aware that you all were unloading the pipe?" Answer: "Yes, ma'am." Question: "He was?" Answer: "Yes, ma'am." Question: "Okay. He wasn't?" Answer: "Oh, no. He was aware that we were going to unload it." Question: "But as for the actual process of unloading it, was he aware that you all were doing that?" Answer: "Well, that's what we went over there to do, was to unload the pipe; and he walked into the boat. And he was up inside the boat, and we walked to the back of the boat, or I did. I don't remember if there was somebody there or not, but I think there was. And I walked to

the back of the boat and was going to pull the pipe off; and like I say, about that time, Dudley walked over there; and he leaned down to pick something up off the boat. And the pipe came down and caught him on the back of the neck." [219] And then it continues. And then a little further down. Question: "So he was up when you all were unloading the pipe?" Answer: "Right." Question: "So it was two of you guys grabbing the pipe to unload it?" Answer: "Right." Then it goes on and it picks up again. Question: "Okay. So after this happened, what happened next after that when it fell and then you all picked the pipe back up." Answer: "Yeah. He had to lean down, and we were moving the pipe around. And it kind of got him on the back of the neck; and, you know, I asked him if he was all right. And he said he was fine. And we got the pipe and unloaded the pipe and went on about our business." Then it continues. Question: "Okay. So when you all picked up the pipe, did it just kind of like top heavy, and that's how it fell on him?" Answer: "No. It was laying – like it was laying in the boat all the way to the front of the boat. And there's steps that go up to the front of the boat where the driver sits and stuff and was sitting on there; and when it was pulled out, it dropped down one of those steps right there." Question: "Oh. Okay. So just a small portion of the pipe fell?" Answer: "Yeah. Just the end of it." Question: "The end of the pipe fell on the back of his head?" Answer: "Right."

So this Court finds that at the time of the incident, Mr. Dudley Foussell was in his cabin and was engaged in the [220] overall situation involving the pipe, whether loading or off-loading; that Mr. Reeves was also there and engaged; that Mr. Bullman, based upon Mr. Bullman's testimony, at least saw the pipe at a time when Mr. Foussell came out of the back deck and said, "I got hit" or

"something hit me" or "I got hurt" such that he laughed. Now, there is confusion in Mr. Bullman's mind as to whether it was loading or unloading, but he is very forthright in that to his mind it was a nonevent and it had been some time ago. There is some question as to whether or not this Brown Water hand was there, and there is some question as to whether or not when the actual event involving the injury or alleged injury to Mr. Foussell occurred, whether or not Sean, the other deck hand, was there; but Sean played, in all likelihood it seems, no active role. All right.

Then as to the mechanics of what was occurring at the time. As this Court noted, this Court makes the following findings of fact based upon the evidence and testimony it has received. That on August 15th, David Serrette, a tool pusher with Parker, ordered the vessel of which Dudley Foussell was the captain to go to the dock and to obtain the 20 foot piece of PVC pipe. The pipe was delivered to the dock as is indicated by testimony in the invoice. It was carried to the vessel by the plaintiff and at least one other person. The witnesses are varied on who that was. [221] Mr. Foussell is adamant it was the truck driver.

MR. FOUSSELL: Correct.

THE COURT: It was loaded onto the vessel by Mr. Foussell and at least some other party. However, what is relevant in the specific finding that this Court makes is that Mr. Reeves was involved in that loading. Whether it was hands-on or not depends on whether or not one were to find that this incident occurred loading or unloading. Mr. Reeves says it was unloading. Mr. Foussell says it was unloading; and in fact, this Court finds that that would be the more probable scenario.

This Court finds that the more reasonable scenario based upon the more credible testimony presented by witnesses and the documentary evidence is that Mr. Serrette was trying to shut down his rig, and he was trying to get off site. And before he could do that, he had to get that mud out of the sump; and his vacuum pump was not accomplishing it. This was causing wait time. It is clear from Mr. Serrette's testimony wait time is not a desirable thing in the oil patch. In fact, it is his memory that the wait time was so distressing to both himself and the company man that he believes that in this instance he made an accommodation to the company man and modified his, IADC reports because the wait time was so problematic. Mr. Serrette came up with an idea to fix the problem, and that [222] is to sort of jerry-rig a piece of PVC pipe onto portions of the rig which would allow the sump to be pumped out in a much more efficient fashion. And he ordered by way of the company man a 20 foot piece of 6 inch PVC pipe for that purpose. This Court finds it was ordered. It was delivered, and it was received by Mr. Reeves on August 15th. This Court finds that it was loaded onto the vessel August 15th at some point after the four o'clock delivery and that at least Mr. Dudley Foussell and Mr. Reeves were engaged in that in the sense that they knew it was being put on the boat at that time. This Court also finds that, again, the rig was waiting but not on this pipe per say. The rig was waiting on a Camco SSSV [sic]. That is what had to be there for the rig to complete what it had to do. It's a safety valve. That had to be obtained and had to be put on. They were waiting on that SSV. Now, before Mr. Serrette could sign off, he had to get all the pollution and all the problems, all the cleanup done; and that dealt with the sump. But to finish the job vis-a-vis the company man, they had to have that Camco

man and that SSV; and they had been waiting on that, if you look at the IADC reports. And the company man couldn't finish his job until he got that SSV. Mr. Serrette couldn't finish his until he got the PVC pipe, but the company man couldn't finish what he had to get done vis-a-vis Parker until that safety valve [223] arrived. And they had been waiting on that safety valve for some time if you look at the IADC reports. And that is the wait time that was causing the consternation because in fact what Mr. Serrette thinks he put in the IADC report to cover up the wait time was the pumping out of the sump. So it was waiting on that SSSV [sic] that was causing the greater degree of consternation.

Therefore, it is not unreasonable to accept Mr. Foussell's testimony, and that which is bolstered by some degree by Mr. Reeves, that he was not allowed to go back to the rig with that PVC pipe once he got it after four o'clock on the 15th. If in fact that's what the whole rig was waiting on, they would have sent him back. But for some reason, the vessel logs are clear. Mr. Foussell testifies as well, as does Mr. Reeves, because it was the next morning when Mr. Reeves says he came down to speak to Mr. Foussell about whatever, he had not been allowed to go back to that rig. That's because he was waiting on that Camco hand with the safety valve. Once the Camco hand with the safety valve arrived the next morning, Mr. Foussell was able to make his run back in. That becomes pivotal because Mr. Serrette is very clear that he used a piece of PVC pipe to pump out that sump. What is at issue here from a mechanics standpoint, the mechanics of the incident, is whether or not it was the PVC that had been ordered shown [224] by invoice and arrived that afternoon. Well, it got in sometime after four; but it was well after

nine, a bit after nine the next morning before the run was allowed to be made because the Camco hand hadn't shown up. It is not unreasonable to assume that Mr. Serrette took some of the other PVC pipe that was already on that rig – he testified it was there, it was just of a different diameter – and went ahead and tried it to see if it would work. He's on wait time anyway. It is not unreasonable that he took a piece that he already had the [sic] on the rig, he jerry-rigged it with his duct tape just like he had specific memory of doing, he tried it out to see if it would work. He was waiting anyway, and he didn't have anything to lose. And that would make sense if one looks at the totality of the circumstances. The wait time that caused the consternation and the ultimate accommodation was the wait time on the SSSV. So it is not unreasonable to assume that in fact once he had tried the PVC pipe that was on the rig that in fact at 6:30, as the IADC reports show, there was no need to bring that 20 foot piece of 6 inch PVC pipe out there because he had already gotten it done. Now, he has specifically memory he did it during the day and not at night. There is a discrepancy within the testimony. However, as to whether or not the pipe actually when out there, the scenario that was just laid out by the Court [225] above is not unreasonable. However, all parties agree that while the pipe was being handled in some fashion – and I say parties. I mean in the terms of those who were engaged. Bullman, Reeves, and Foussell, that while pipe this PVC pipe was being handled in some fashion, it hit Mr. Foussell. So as I said earlier, it is not necessary that in fact it be determined whether they were loading or unloading; and the reason for that follows as well with how the mechanics of this matter more than likely occurred.

Additionally the scenario laid out by the Court would be supported by the vessel logs, which don't show a run out on the 15th but do show a run out on the 16th, would be supported by the IADC reports as well and would be supported by the invoice matter. If the pipe arrived in the afternoon of the 15th and that's what they were waiting on and they were so worried about wait time that they were falsifying their IADC reports, it makes no sense that they wouldn't have sent that boat out with that piece of pipe.

At any rate, therefore, the more likely scenario is that they were engaged in off-loading; but this Court need not make the actual determination as to whether it was off-loading or on-loading. The three people who were there at the time the incident occurred agree that he got hit and that Mr. Foussell and Mr. Reeves, at least in Mr. Reeves' statement in November, agree that he had his hands [226] on the pipe at the time that this occurred.

So it is the morning of the 16th. It's 7:30 a.m. or sometime soon there before. This Court finds the more reasonable scenario is that Mr. Reeves walked down to tell Mr. Foussell that they weren't going to need that pipe. Now, it is important to note that in fact the majority of the communication between the rig and the dispatcher, Mr. Reeves, was done by telephone. There was no telephone on that boat. So at 7:30 in the morning, if Mr. Reeves had left his trailer, and coffee pot, which was of key importance to all parties involved – Mr. Bullman talked about the coffee pot being in the dispatcher's office. Mr. Foussell said he didn't have one on the boat, but it was up in the dispatcher's office. But at any rate, if he left that, it is reasonable to assume it was to do something that he could not otherwise accomplish except by going down there. If he

were only going to just discuss matters with Mr. Foussell, he could have done it via the radio. In other words, if he was just going to say "The Camco guy, whoever you're waiting on still isn't here, not sure," he could have don [sic] that by radio. He would not have had to leave the post. That's what a dispatcher does. He's there to answer the rig and then facilitate and coordinate. So he walks down – Mr. Reeves agrees that he walks down. Mr. Foussell agrees that he walked down. Mr. Bullman agrees, [227] as to what it was that Mr. Bullman saw when Mr. Foussell's alleged injury that Mr. Reeves had walked down. So we have all three of them saying he walked down. He woke up the plaintiff. That's in Mr. Reeves' statement, and that's what Mr. Foussell says. And that the captain walked out on the back deck of his boat. He walked out on the back deck of his boat barefooted. That becomes important. He walked out on the back deck of his boat to see what Mr. Reeves might want. It was 7:30 in the morning. He didn't have his shoes on. Now, Mallard Foussell has told me Parker has the rule, which many companies do, boat companies, you can't be fiddling around or working on that boat barefooted. All right.

This Court makes the finding that on the more credible testimony presented that Mr. Reeves told him they were going to do something with the pipe, off-load, on-load, that they were going to do something with the pipe. More likely it is that they were going to off-load. Whether Mr. Reeves had a Brown Water hand with him or not does not necessarily become pivotal. However, once Mr. Foussell was aware that work was going to be done on his boat and that it involved this pipe – and this is why I think it is reasonable that it was off-loadings and not on-loading, because he was reaching for his shoes. If they are in the

on-loading process, he had walked it down from the truck. [228] And everybody who was there agrees he bent over in some fashion. All right. Additionally, once Mr. Foussell was aware because Mr. Reeves told him that they were going to do something with this pipe, more reasonable basis is that they were going to off-load this pipe, then the captain went down into the boat. Now, if you will recall, that's how the pipe has been put. The pipe when it was loaded onto the boat had been placed down into the cabin and on top of a cooler.

Now, the cooler is approximately knee-high, approximately 18 to 20 inches. There are two steps leading up to the step landing, whatever you wish to call it, where the cooler was that are each ten inches or at least certainly one is ten inches, if you assume that the second one would be of equal amount so that it would be within code. That's 20 inches, plus the 18. That's 38 or approximately 38 to 40 inches that the pipe was sitting above. Now, in Mr. Reeves' mind, the captain went down; and it would not be unreasonable for him to assume that the captain was going to help him off-load it in the same fashion the captain helped him on-load it. That is not unreasonable. People don't usually meddle on captains' boats. They generally let the captain do it, and the captain tends to get bent out of shape when somebody meddles on their boat. Nonetheless, the captain admits he [229] went down into the area and does not dispute that he was going to help them off-load it and in fact ultimately did help them off-load it. Mr. Reeves then from his viewpoint, it is not unreasonable to assume that he thought the captain was going down there to help the captain off load. The captain goes down to help them off load, which is work. He has no shoes on. That's a violation of company rules. Therefore. He leans down to

get his shoes. He sits down. According to Mr. Foussell. On the bench. Which is 24 inches high /he leans over; and whether his. As Mr. Siahatgar said. His behind stayed on the bench or came off the bench a little bit or not doesn't seem to be at issue here because he admits he's down underneath that pipe getting his shoes. And gets his shoes and is coming back, and the pipe strikes him. If you will recall, the portion of the statement that I read from Mr. Reeves was that the pipe hit Mr. Foussell, came one step on that top step. Now, it is not clear from the statement how in the world Mr. Reeves knew this unless he could see down in there. I don't know whether he could see in there or not. One can assume that's not unreasonable because the captain said he could see Reeves with his hands on the pipe. So if he could see Reeves' hands, than I guess it is not unreasonable to assume that Reeves could see the captain. And this is Reeves. "Yeah, he had leaned down; and we were [230] moving the pipe around. And it kind of got him on the back of the neck; and, you know, I asked him if he was all right." And then Reeves said talking about the pipe, he says, "There are steps that go up to the front of the boat where the driver sits and stuff and was sitting on there; and when it was pulled out, it dropped down one of those steps right there." "Okay. So just a small portion of the pipe fell?" "Yeah, just the end of it." Question: "The end of the pipe fell on the back of his head?" Answer: "Right." That purports with Captain Foussell's memory that he did not hear that pipe going, sounding its way down the different steps. I asked him several times about that; and he said, "No, I didn't hear that." Mr. Reeves says it just went off that one step.

Now, Mr. Reeves, in either his deposition or statement, indicates that his estimate of the weight of that pipe

is approximately 100 pounds. Consequently, Mr. Reeves knew that the pipe had some substantial weight to it. If Mr. Reeves' testimony is to be accepted – and this Court has made a finding that certain aspects are – then in fact he had manhandled it. He had carried it at some point. He had handled it either in the loading or the off-loading. So he knew. Otherwise, how would he know it weighed a hundred pounds. I don't remember that being on the invoice. But at any rate, he had at some point handled [231] this pipe. Now, that becomes at issue because there is no evidence that Mr. Reeves knew this pipe was sitting on a cooler. There is no evidence that Mr. Reeves ever went down into the belly of the boat and saw that it was sitting on a cooler, except for perhaps when he saw the captain leaning over. If he saw enough to see the captain leaning over and it fall on him, then it is not unreasonable to assume he would have seen the cooler. But this Court need not make that finding or determination. What is relevant here is that there is no specific testimony at this time that Mr. Reeves knew specifically that it was sitting on the cooler, but he knew he had a 20 foot piece of pipe weighing approximately 100 pounds angled down into the belly of a small crew utility boat with a captain down in there with him.

What is also relevant is that the captain knew he had a 20 foot piece of pipe of sufficient weight that he could not pull it off the truck. He was specific about that. He thought he could. He tried. He couldn't. He had to get the driver to help him. So he knew he had a heavy piece of pipe. He knew he had it sitting on a cooler. He knew the cooler had a rounded top. He knew the cooler did not completely fill the area where it was sitting, that there was room on either side for it to move and he put – he also

knew he had people on the back deck of his vessel [232] because he had just been out there with him. And this Court has made the finding that he knew that at some point they were going to off-load this or handle rather this pipe. More than likely it is off-load, but certainly they were going to handle this pipe. And yet, he chooses to bend down underneath this pipe.

Now, this Court accepts Captain Foussell's testimony as to why he put the pipe on the cooler. He put the pipe on the cooler because he didn't wish to risk scarring the floor. He testified that prior to that time he had carried a piece of pipe in the same fashion, and it had scarred his floor. He didn't want to scar his floor. So he put it on the cooler. That was his decision, his decision alone. No one told him to do it. No one suggested that he do it, and there is no evidence that anyone knew he had done it. This was the captain's choice.

The pipe extended from the cooler on the stair leading up to the bow door up to and out of the doors going onto the back portion of the vessel at an angel. That opening is 24 inches wide, the open [sic] which goes down to the stair well that one must back down to get into the crews quarters. Mr. Foussell has testified he was on the back deck when the pipe was there, and he has testified that he backed down those same steps when he went down to get his shoes and engage in the off-loading process. He also [233] testified that one reason he did not secure the pipe – and this Court makes the finding of fact and accepts Captain Foussell's testimony that he did not in any way secure the pipe – that one of the reasons he didn't secure it is because his hatches were in the back, and he had some leaks, and he wanted to be able to quickly get into either of those hatches. Given the fact that he has testified that he

wanted to get into the hatches, given the fact that they, according to the exhibits that are put into the record, came together in the middle of the back end of the boat and opened up, then it is not unreasonable to assume that that pipe was angled coming out of that openway. Otherwise, it is not reasonable to assume that a man the size of Mr. Foussell could have gotten down those stairs backwards straddling a pipe. It's only 24 inches wide. It's not secured. It is more reasonable that it is pushed to one side or the other so he can quickly get in at least one of his hatch covers if he has a leak and so he can get down his stairs. But at any rate, the pipe is sticking up through the back portion of that vessel, which brings this matter to Mr. Reeves.

It is clear from the statement that Mr. Reeves gave some two months after this incident that he believed that the captain was aware that they were about to off-load this pipe. It is also clear that he admits that he was, quote, [234] moving it about. It is not unreasonable to assume that he was moving it about, getting it placed perhaps more to the center so that when they pulled it out, it would come out clean. It's a 20 foot long piece of pipe. An angle on it could create a problem when you are trying to get the back end out of the boat, out of the door, the openway. If it is angled, you could catch the end of that. So it is no unreasonable to assume he was getting it straightened. That would account for why a man seasoned in the oil patched [sic] didn't say to the captain, "Hey, Captain, we are about to start. You ready down there?" There is no evidence he did that. That's why it would be reasonable to assume that he was merely getting it somewhat more aligned in order to pull it out. But this Court need not make that specific finding. All this Court need find is what

Mr. Reeves admitted, and that is he was moving the pipe about for whatever reason and that he had not told the captain he was going – he was going to begin the moving process when he did that.

Therefore, if in fact this Court is to find as it has that the pipe was sitting on a cooler some 18 inches above the step, that the top portion of the cooler was rounded and domed and that in fact the cooler did not fill the entirety of the passageway or step or whatever you want to call it that it was sitting on and that it was not secured [235] in any fashion and that at some point in time Captain Foussell bent down underneath that pipe and Mr. Reeves, quote, moved it about, close quote, this Court finds that a portion of the pipe did fall from the cooler to the top step, which would be comport with Mr. Foussell's memory of the sound and Mr. Reeves' somewhat ambiguous testimony in his statement that it went to the first step and it hit Mr. Foussell on the back of the head and perhaps the shoulder. So pipe falls off the cooler to the top step and hits the plaintiff. But again, this Court need not find anything other than it fell, it hit him, Mr. Reeves moved the pipe, Mr. Foussell had put himself underneath that pipe.

Mr. Bullman hears Mr. Foussell say that he had hurt himself. Mr. Reeves hears him say that, and Mr. Foussell gives an accident report when he ends up out at the vessel thereafter. Mr. Foussell testified he did not lose consciousness. Upon reiteration, he testified he had to sit down, and he was dazed. And that again argues that if in fact he had to sit down and he was crouched down underneath the pipe and the pipe had to hit him up here that he sat down in the well of the vessel, which means the pipe couldn't have fallen all the way down. But at any rate, he did not lose consciousness. That is the matter that this Court need

find as a specific finding of fact to tie into the medical testimony, and that he did in fact [236] report an incident to Mr. Serrette. And Mr. Serrette has testified that his investigative report was based on, quote, I think he said, notes that he scribbled at the time; and therefore, this Court finds it not unreasonable that it would not have been accurate.

Consequently, this Court finds that plaintiff, Dudley Foussell, testified that he loaded the pipe into the cabin and placed the pipe on the top of a cooler because he didn't wish to scar his floor, the cooler being approximately 18 inches high, 12 inch diameter with a rounded top sitting on the top step of the portion of the boat that led to the bow door. Again, Foussell testified this was his decision; and he put it on a cooler as he did not want to place the pipe on the floor of the cabin as it would scratch the floor because he had carried some pipe in the same fashion earlier and it had scarred his floor. He did not secure it because he did not wish to block access to the hatch area, and he wanted to be able to move the pipe in order to access the hatch area.

The pipe remained on the vessel some approximately 16 hours. It is unclear whether Foussell made a run to the rig with the pipe on August 15th. However, the vessel logs do not show this. Reeves testified a run was made. However, Mr. Reeves' memory was less than clear, perfect, or consistent.

[237] Mr. Foussell testified he remained at the dock waiting for a passenger or some other material until the morning of August 16th. This comports with the vessel logs, the arrival of the Camco hand, the needed SSSV, and the IADC reports. Consequently, at approximately 6:30 to

7:00 a.m., Foussell was awakened by Reeves, who was accompanied by Captain Billy Bullman and perhaps a third. Foussell came to the back deck of the boat and was informed by Reeves that they no longer needed the pipe on the rig and that they were going to take the pipe off or, as I said, this Court need only make the finding that they were going to handle the pipe in some fashion.

This Court makes the specific finding that no warning was given by Reeves to Foussell that the actual unloading was going to commence at that time other than "We are going to unload it." In other words, he did not give him a warning, "Captain, heads up, we are about to start. Are you ready down there?" That was not done.

Additionally, this Court makes the specific finding that although Foussell first testified that he saw spots after the blow, he later testified that he was somewhat dazed and had to sit down. However, this Court makes the specific finding that he was able to assist in the off-loading of the pipe, that he told both Bullman and Reeves that he was all right; and he later, an hour and a [238] half to two hours later, told Serrette that he was all right and that approximately 15 to 20 minutes after the incident, he left the dock in his vessel and made the one and a half hour run to the rig with a passenger.

Mr. Foussell has been very forthright with this Court that he is of the opinion that if his work environment is not something he feels comfortable with, that it's well within his rights to leave. He has done this several times, gave several instances during his testimony. Consequently, it is not unreasonable to assume that if in fact Mr. Foussell felt that he was sufficiently injured that he would not be safe in handling his boat that he would have

left. He did not do so. It is undisputed that David Serrette told Foussell by way of the dispatcher that the Marine Vessel MARGARET be used to carry the 20 foot pipe piece of pipe. It is undisputed that the back cargo deck of the Marine Vessel MARGARET was something less than 20 feet. It was also undisputed that the captain chose to accept the pipe onto his vessel. Again, this becomes relevant because the captain has made it perfectly clear that if he feels something is not safe, proper, or correct, he will leave a job in a heartbeat. He did it in the instance when he was talking about the hurricane. He was conscientious enough to remain and make certain the boat was all right, but then [239] he quit. The instance with the cook and the microwave oven, the instance with someone he felt who had been less than honorable with him, he quit.

So it is undisputed that Foussell chose to accept the pipe, and it is undisputed that it is within the captain's purview to turn down something that he feels that will render his vessel unfit or make it so dangerous as not to be acceptable.

It is also undisputed that it was Foussell, Captain Foussell, and Captain Foussell alone who chose not to place the pipe directly on the cabin floor. This is a 20 foot piece of pipe. You can repaint cabin floors. Additionally, there are other ways to prevent scarring than putting it up on an 18 inch cooler with a 12 inch diameter and a domed top. One can put a pallet under it, a wooden pallet, a towel under it. One can put a great many things under it, or one can put it on the floor rather than create an unsafe condition. And it is undisputed that the captain chose to do that; and that is what perhaps diminishes to some degree the argument as to whether or not the pipe could have been secured on the outside with bits, without bits, to

tires, above, over, beyond. It seems that begs the question. The blasted pipe could have been put exactly where it was on something else; and then if it were manhandled, it would not have fallen off the cooler because [240] it wouldn't have been on the cooler. And there was testimony by Captain Foussell that he has carried materials in his boat in that fashion, i.e., sticking down into the cabin and up onto the deck times before this; and it did not create a problem. And in fact he said, "I had carried a piece of pipe before, just recently stuck down there in that same way; and it scarred up my floor." That was the only incident that arose out of that. So clearly the vessel was capable of carrying cargo in that fashion in a safe manner if you don't put it on a cooler or if you secure it in some fashion. He chose, and it is undisputed this was his decision. He chose not to secure it because he wanted to get in and out of that hatch. But you could have angled it, and you still couldn't have secured it.

Now, there is some question as to whether or not there was a place for it to be secured on the landing where the cooler was. Perhaps there was. Perhaps there was not. But it is not disputed that at some point from the point of the bow door, the door off to the bow, rather going into the bow, and up and out to the back deck that there was at somewhere along that run a place where it could have been secured. If at no other point, to the railing, the side of the steps at the top, the little prong at the top where the steps went down. So as I said, the plaintiff testified that he had previously safely transported pipe in this same [241] manner; and in fact the only resulting problem of that had been that he had scarred his floor.

This Court notes that defendant's expert, Richard Frinzel, testified as to several other ways that he felt

wherein the pipe could be safely secured for transport which he argues could have avoided the accident. However, again, if you didn't put it on the cooler and you put it on the floor, this accident in all likelihood would not have occurred unless someone were to pull it so far as to pull it all the way off. This Court does not find that's what happened in this instance.

Now, plaintiff has asserted a Jones Act claim for negligence against his employer, Parker. This Court finds no negligence on the part of Parker or its employee, David Serrette, the tool pusher, who ordered Foussell to transport the pipe to the rig on the Marine Vessel MARGARET. Serrette did not instruct Captain Foussell as to how to transport the pipe, how to secure it or not secure it on the boat, how to stow it on the boat, and did not send the captain out in weather conditions or in a rush situation that caused this incident to occur. And Captain Foussell has testified that material has been transported in this fashion on the vessel before with no incident other than scarring the floor; and, of course, there is the defendant's expert which testified that there were other [242] ways that the pipe could have been put. Perhaps none ideal but, that is not the standard for negligence in this matter. There were no other Parker personnel involved. So the negligence in this matter would have been failure to provide a safe place to work, and that would have been in David Serrette ordering them to use the Marine Vessel MARGARET. The Marine Vessel MARGARET had been used prior to this time to carry cargo in exactly this fashion with no incident, and there is not a sufficient evidence upon which this Court could find that had it not been placed on a cooler and not been secured that it could have been carried safely; and that if the captain hadn't put

himself under it – it took some bending to get himself under that piece of pipe. At any rate.

As I said, there is no evidence to show that had the pipe not been placed on an unstable surface approximately 18 inches off the top floor with no manner of it having been secured and the captain having placed himself beneath that level that it could not have been safely carried on that vessel in the fashion anticipated. Again, it doesn't have to be ideal. It's a question of whether or not it was negligent to do it; and then of course, when I get to the concept of unseaworthiness. The law does not require ideal or perfect, but it does require that which could be done in a manner which reasonable people would do. It's [243] reasonable. It's been done before. It would be done again. There is no testimony that it created a hazard in and of itself if it hadn't been sitting on a cooler 18 inches above with a dome top and not secured. Consequently, this Court does not find negligence on the part of Parker. It finds, rather, that as to the use of the Marine Vessel MARGARET and the manner in which it was used, negligence would fall, unfortunately, at the feet of the captain in choosing not to place the pipe on the floor, in choosing to place the pipe on an unstable surface, on a nonflat surface 18 inches above the floor, and in choosing not to secure the pipe that was placed in that fashion and then putting his head and shoulders beneath that pipe with the full knowledge of how it was situated and that there were people on his back deck who were there to engage in off-loading. Consequently, this Court finds in favor of the defendant Parker as to plaintiff's Jones Act negligence claim.

Plaintiff has also asserted a general maritime law negligence claim against C&F for the negligence of their employee, Gary Reeves. This Court finds that based upon

the factual scenario stated by Reeves that he was in fact moving about the pipe and that in fact a heads-up had not been given to the captain, that they were actually now starting the anticipated off-loading process and knowing [244] that he had an approximately 100 pound piece of pipe 20 foot long reaching down into the bow of the vessel with the captain down there with it, that it was negligent on his part for not warning the captain that he was going to actually start and give him a heads-up.

And this Court finds that in fact Mr. Reeves did physically manipulate the pipe based upon his statement taken two months after this accident and that after he manipulated the pipe, quote, moved it about, close quote, the captain said something fell on him. Accordingly, this Court finds that there is negligence on the part of Gary Reeves, employee of C&F. However, this Court has also found that there is comparative fault on the part of the captain, Dudley Foussell, in this matter; and in fact this Court finds vis-a-vis the actions of both parties, Captain Foussell's actions to have contributed 75 percent to his injury and accident and Mr. Reeves 25 percent.

Now, there has been a great deal of debate on whose behalf, if anyone, Mr. Reeves was acting. First, the plaintiff seeks to impute Mr. Reeves' negligence to his employer, C&F, which this Court will address in a moment. Second the plaintiff seeks to impute the negligence of Gary Reeves to Meridian on the basis of agency, i.e., that Reeves was an agent of Meridian. Co-defendant, C&F, seeks to impute the negligence of Reeves to Meridian on the basis [245] of that Reeves was a borrowed servant of Meridian. However, well into this trial, C&F withdrew its claim of borrowed servant. So this Court is left at this time as to the agency matter.

As to agency, the matter of agency as to plaintiff's claim against Meridian for the acts of Gary Reeves all parties agree is governed by the General Maritime law. all counsel have agreed that the law of agency is further restatement, second that Agency Section 1 is controlling. An agency relationship is created when one party consents to have another act on its behalf with the principle controlling and directing the acts of the agent, citing American Telephone & Telegraph Company v. Winback and Conserve Program, Inc., 42 Fed Third, 1421, Third Circuit, 1994 and the Restatement Second of Agency Section 1, 1958. Quote, depending upon the right of control capable of being exercised by the principle over the agent, agents are characterized either as servants or independent contractors, whereas generally are employees of the principle and are subject to physical control by the principle. As one court has explained the distinction, quote, an agent is a person who represents another in contractual negotiations or transactions again thereto. A servant is a person who is employed to perform personal services for another in his affairs and who and with [246] respect his physical movements in the performance of the service is subject to the other's control or right to control. Persons who render services but who retain control the manner of doing it are not servants. Citations omitted. But yet, the employer assumes the right to control the time, manner and method of executing the work and as distinguished from the right merely to require certain definitive results in conforming to a contract. A master's servant's agency relationship has been created, close quote. Citations omitted. If however, the agent is not subject to that degree of physical control but is always subject to the general control and direction of the principle, the agent is termed an independent contractor.

This Court finds that based upon the testimony and documents presented, Reeves was a dispatcher; and as such, his responsibility vis-a-vis Meridian was to assure that the materials and men were timely transported from the rig or to the rig or wherever they were needed. Additionally, he was responsible for signing the invoices and counting the materials, i.e., pipe, etcetera, in order to determine that the proper supplies and materials had been provided by the suppliers. Testimony of Ron Ivy of Meridian is that the company man only instructed Reeves as to the necessary materials, did not control his method of providing or transporting the materials in a timely manner to the rig. [247] Testimony of Mr. Baumgardner, owner of C&F, is that Reeves as his dispatcher was a coordinator, that his job was designed to pull together what was needed and necessary to move men, equipment, and supplies from place to place by way of coordination. Accordingly, based on the facts presented to this Court and the testimony received, this Court finds that an agency relationship did not exist between Reeves as a C&F employee and Meridian, thus to make Meridian responsible for Mr. Reeves' negligence.

Borrowed servant has been withdrawn. Therefore, this Court will not address it, except to say based upon the testimony presented throughout this matter before it was withdrawn and the arguments of counsel, it is not likely this Court would have found borrowed servant to have existed.

Now, there has also been the argument and, of course, plaintiff first seeks to impute Reeves' negligence to his employer, C&F. C&F, through some convoluted procedural process, seeks to have this Court declare that Reeves was acting outside the course and scope of his employment;

and as such, his negligence should not be imputed to his employer. In this process, C&F has moved this Court under 15(b) to amend its pleadings to allege course and scope, the defense of course and scope. The Court deferred its ruling on the 15(b) in order to allow all testimony which [248] C&F wished to put in on this issue to come in and did so either by way of a proffer, ultimately, or by way of matter of the record should the Court allow the 15(b) amendment and overruled plaintiff's vehement objection to the interjection of the issue of course and scope at this late date. Plaintiff also objected to the 15(b) amendment. Mr. Kimball argued vehemently that in fact an amendment is perhaps not necessary under 15(b) because the course and scope under Texas laws which he argues would be applicable does not make it an affirmative defense such that it should in fact have to be included within the pleadings. Again, plaintiff objected because he had not had opportunity to address that issue as to whether or not in fact Texas law would be the applicable law, since in fact General Maritime law was applied.

Additionally, the plaintiff argued that pursuant to Rule 26 and Rule 16 that the issue of course and scope should not be allowed to be interjected at this late time, arguing prejudice and in particular the fact that Mr. Reeves was taken by a videotape deposition, he is not present, he, meaning the plaintiff, was not on notice at the time of Mr. Reeves' deposition that this was going to be done. Mr. Ivy's deposition was taken and presented at trial; and again, plaintiff argues he was not on notice that it is well into trial and he has already reached close [249] to the end of his testimony and evidence. And consequently, to allow it at this time, particularly in light of this Court's order that the plaintiffs submit an outline, the

defendants respond to that outline, and that that outline include the defenses that the defendants intend to use and this Court's verbal admonition to all parties that if a defense was not included that in fact it was deemed waived.

As the record will reflect, this Court had concern because this Court accepted this case off of Judge Kent's docket; and counsel are not, as, such are not accustomed to practicing this Court before this judge. So I had concern, particularly since this was such a pivotal matter of just ruling that in fact C&F was precluded from addressing this issue. Consequently, the Court deferred because one of the issues that the Court should look to by way of case law is the futility of the requested amendment. On issue of motion of leave to amend under Rule 15, the court in Davis v. The United States, Fifth Circuit, October 29, 1991, 961 Fed Second, 53 Fifth Circuit, the court – and I believe that might have been a 15(a) or 15(c) rather than 15(b). The underlying rationale would be the same. Notes that Davis in this matter filed a Federal Rule of Civil Procedure 15 Motion seeking leave to amend his pleadings. Federal Rule of Civil Procedure 15(a) states [250] that leave to amend pleadings shall be freely given when justice so requires. This leave to amend, however, is by no means automatic. And certain cites are given. A district court's decision to grant or deny leave to amend will be overturned only for abusive discretion. Certain cites are given. In exercising this discretion, a district court considers a variety of factors such as undue delay. In this instance, we were well into trial. Bad faith. Plaintiff politely argues that there must have been bad faith involved because it was the defense of course and scope was not raised in the outline, response to the outline as required; and his memory was

that it had not been raised in Mr. Baumgardner's deposition as well. As will become clear later, the Court allowed Mr. Baumgardner's deposition in; and there were questions that dealt with this issue, although it didn't call it by those words. Undue prejudice to the opposing party by allowing the amendments, plaintiff certainly argues that they would be prejudiced. They did not have the opportunity to deal with this with Mr. Reeves. He was brought by way of deposition. They did not have the opportunity to deal with this with Mr. Ivy. He was brought by deposition. And as will become clear, there became problems with Mr. Baumgardner as well. And perhaps the one which was most perhaps instrumental in the Court's decision to defer, the [251] futility of the amendment. As to the futility of the amendment, it becomes incumbent for this Court to have some determination as to whether or not the amendment might well have merit, worth, or succeed.

As such, this Court notes that as parties agree that as to the question of course and scope that the matter would be dealt with by the restatement of torts. The restatement defines scope of employment as follows:

And, Patt, put in what I'm going to highlight. It's the same matter, gentlemen, that I read earlier in response to Mr. Siahatgar. Sylvia, show Patt exactly what comes in, be sure she gets the first portion. I won't take the court's time or the party's time to read it at this time. I've marked them in highlight 1, 2, and 3. And Patt, in that portion when I went through this with counsel and I went through the different factors on it with Mr. Reeves, those are the factors that were put in. So we'll pick up that portion when I was discussing with Mr. Siahatgar this concept, and that would be my reasons on the course and scope.

***REPORTER'S NOTE:** By order of the Court, the following material is being appended to this transcript. It was not actually spoken at the particular time.

The Restatement defines scope of employment as follows:

(1) Conduct of a servant is within the scope [252] *of employment if, but only if:*

(a) it is of the kind he is employed to perform;

(b) it occurs substantially within the authorized time and space limits;

(c) it is actuated, at least in part, by a purpose to serve the master;

(d) if force is intentionally used by the servant against another, the use of force is not unexpectable by the master.

(2) Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits or too little actuated by a purpose to serve the master.

Footnotes:

(1) To be within the scope of the employment, conduct must be of the same general nature as that authorized, or incidental to the conduct authorized.

(2) In determining whether or not the conduct, although not authorized, is nevertheless so similar to or incidental to the conduct authorized as to be within the scope of employment, the following matters are to be [253] *considered:*

(a) whether or not the act is one commonly done by such servants;

(b) the time, place, and purpose of the act;

(c) the previous relations between the master and the servant;

(d) the extent to which the business of the master is apportioned between different servants;

(e) whether or not the act is outside the enterprise of the master or, if within the enterprise, has not been entrusted to any servant;

(f) whether or not the master has reason to expect that such an act will be done;

(g) the similarity in quality of the act done to the act authorized;

(h) whether or not the instrumentality by which the harm is done has been furnished by the master to the servant;

(i) the extent of departure from the normal method of accomplishing an authorized result; and

(j) whether or not the act is seriously [254] *criminal.*

The law is settled that where a servant acts about the master's business for which he is employed, the master is liable although the servant acts beyond his authority or in a forbidden manner. If the servant's act is unauthorized, it is still within the scope of his employment if it is of the same general nature of and incidental to the conduct authorized. For the master to escape liability, it must be shown that the servant, when the wrongful act was committed, had abandoned his employment and

was acting for a purpose of his own which was not incident to his employment. If the injurious act is not shown to be a separate and independent transaction, the master is not relieved because the servant in some respect acted beyond his authority. A servant usually is not employed to be negligent, but this does not mean that a negligent act is outside the scope of his employment. The master is liable if the act was incident to the ultimate purpose of the servant's employment.

* * *

[255] Consequently, this Court finds that based upon the applicable law and in particular the very clear statement in the restatement that mere operation outside authority or and in so doing, performing a negligent act and breaking of rules does not necessarily take one out of the course and scope. This Court finds that Mr. Reeves was engaged in his master's business in a time space continuum that was relevant with that. This Court finds that what he was doing was engaged in what he was assigned to do. And that is coordinating and facilitating the movement of men, equipment, and supplies; that if he did in fact put his hands on it and manipulate the pipe, that this was sufficiently similar to his facilitation to the movement of the pipe so as not to take it completely outside the realm and that he was not – he had not in fact abandoned his job and he was not on his own business. He was not on a flight of fancy. As such, then even if the 15(b) were to be allowed and even if the Court were to overrule Mr. Siess's objection on Rule 16 and Rule 26, this Court would nonetheless find that defendants could not and did not establish that in fact Mr. Reeves was outside the course and scope of his employment. It is important to note that as to this issue, the Court allowed the defendant,

C&F, to put on any and all evidence that it desired as to this issue with the exception of calling Mr. Baumgardner live in [256] its case in chief; but that was for other reasons which were discussed on the record earlier, i.e., Mr. Baumgardner left because of his wife's illness. However, this Court allowed Mr. Baumgardner's deposition which was taken at a time when counsel for C&F argues they were intending to make this argument and therefore dealt with it into the record. And in fact, there are questions that deal with this in the record. Additionally, it is important to note that Mr. Baumgardner in fact testified as to the issue, underlying issues of course and scope when he was called by the plaintiff in the plaintiff's case in chief and Mr. Siahatgar was – I'm not certain whether it was when he was questioning, but certainly it was gone into. There was some ambiguity that flagged this question for the Court, and the Court followed up with some questions to see if in fact that's what we were dealing with. So it is important to note that C&F was allowed to put in any and all evidence and all testimony that they wanted on this issue; and it's only after full review of that that the Court finds that, nonetheless, they would not have been successful in proving he was outside course and scope, of course, with the exception of being able to call Mr. Baumgardner live in their case in chief after his having been on the stand and having testified to this issue in plaintiff's case. But they were allowed to put in his deposition at a time when [257] they claimed they were aware of this issue and in fact were dealing with it.

The Court will not reiterate at this time the underlying rationale on 15(b) and who has the burden because the Court allowed C&F to put on whatever they wanted to put

on with that one exception. Consequently, the Court need not address that at this time.

Because this Court finds that to allow the amendment would be futile because under the law, given all the evidence presented, this Court finds that he would not have been outside his course and scope, this Court denies the motion on 15(b). However, this Court does note for purposes of appellate record that in Mr. Baumgardner's deposition taken on July 20, 2000, beginning at Page 19 and extending thereafter to some 3, I think all the way over to like 23, that there is this discussion that hinges to some degree on this matter at issue. So C&F had the opportunity to put in Mr. Baumgardner's deposition. They had the opportunity to cross him when he was on direct with the plaintiff, and they had the opportunity to put him on instead of Mr. Serrette at the close of the day if they knew that there were medical problems. And they were the only ones who could have known it. Mr. Baumgardner is their client.

Unseaworthiness. Plaintiff has also made a claim for [258] unseaworthiness of the Marine Vessel MARGARET against Parker as the owner and operator of the vessel. In determining plaintiff's claim for unseaworthiness, this Court finds instructive the rationale in Little V Green, 428 Fed Second, 1061, Fifth Circuit 1970, which indicates quote, the rationale behind the doctrine of unseaworthiness is to protect the seaman from dangerous conditions beyond their control. Common sense says and pure mechanics confirm that if Little, the plaintiff in that case, had not jerry-rigged the vertical levers which control the power to the winches, that these levers did not have to be held continuously by hand to keep the winches turned. He would not have been injured. If Little's jerry-rig had not

locked these levers and hence the power to the winches, then the instant his foot touched the winch and he released his hold on the vertical levers, the pull of the nets would have stopped and the turning of the winch. His injury was attributable to his own contrivance, not the machinery provided or the procedures prescribed of the vessel. Had little's jerry-rig been part of the regular equipment of the vessel or had some other member of the crew installed the jerry-rig, the problem would be different. But here Little created his own danger and effectively caused his own injuries. The proof shows that the captain had no knowledge of the use of the jerry-rig until it rescued [259] Little. We recognize that a shipowner has been held liable in the Doctrine of Unseaworthiness even where he supplied a seaworthy vessel and proper appurtenances and crew; but an officer or a crew member negligently rigged the device or appliance so as to render it temporarily unseaworthy, and another crew member was injured. And cites are given. While we are unwilling to hear, announce or apply a new variation of that rule which would allow the coverage of the addition of temporary unseaworthiness deliberately brought about without the shipowners' or the captain's knowledge by the same seaman who then injuries [sic] himself on the very defect he intentionally created. Unseaworthiness does not extend to the negligent use of seaworthy appliances. Under these circumstances, the owner did not as a matter of law violate his absolute duty to provide a seaworthy vessel.

In this case, Dudley Foussell was the captain of the vessel, the Marine Vessel MARGARET. It is undisputed that he as the captain of the vessel had control over where the cargo was placed on his vessel for transport or whether to accept the cargo at all. It is further undisputed that

Foussell was the individual who chose to place the pipe at issue on a water cooler and chose not to secure the pipe in any fashion. And the plaintiffs have failed to establish that it was impossible for his pipe to have been secured [260] in some fashion at some point from the point where it was in the bow of the vessel running up and onto the back deck, and there is testimony that in fact pipe has been carried in that fashion on the floor without instant. [sic] It is further undisputed that the manner chosen to stow the pipe on the vessel was totally of Captain Foussell's device. It is further undisputed that Foussell chose to place his head under an unsecured 20 foot, approximately 100 pound pipe perched approximately 40 inches above the floor level with full knowledge that the vessel was tied stern to; and he now had people on his back deck moving about, consequently, making the boat more susceptible to wave action or making is [sic] foreseeable that someone could have jostled, hit pulled etcetera, the pipe.

Consequently, although this Court could find perhaps that the negligent acts of Captain Foussell might perhaps have created a condition which might have been temporary unseaworthiness, however, as per the law noted above, this alleged temporary unseaworthiness cannot form the basis for recovery by Captain Foussell under unseaworthiness when in fact it is he who created the condition. There is no evidence that Mr. Reeves knew the pipe was sitting unsecured and sitting on a dome of a water cooler approximately 40 inches above the bottom of the boat; and there is no evidence that Reeves was aware that the captain [261] had any intention to bend over prior to his bending, so as to place his body beneath a pipe that was sitting approximately 40 inches above the bottom portion of the boat. 40 inches is not that tall. Consequently,

this Court finds that the Marine Vessel MARGARET was not unseaworthy. The pipe could have been carried in a fashion which would have been safe and rather that Mr. Foussell cannot, nonetheless, even if the Court were to find differently, recover under seaworthiness when in fact it is his negligent act that created the unseaworthiness. Accordingly, this Court denies plaintiff's claim for unseaworthiness of the Marine Vessel MARGARET against Parker Brothers as the owner and operator of same.

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